

**PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY**

City of Houston, Texas, Ordinance No. 2004 - _____

AN ORDINANCE AMENDING CHAPTER 40 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, RELATING TO REQUIRING THE OWNERS OF FACILITIES LOCATED WITHIN PUBLIC RIGHTS-OF-WAY TO RELOCATE THEIR FACILITIES TO ACCOMMODATE PUBLIC WORKS CONSTRUCTION PROJECTS; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.

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WHEREAS, the City of Houston is a home-rule municipality having the full power of local self-government under Article XI, Section 5, of the Texas Constitution; and

WHEREAS, a home-rule municipality may exercise its governmental authority independently of the powers expressly granted to it by state statutes; and

WHEREAS, Section 283.056 of the Texas Local Government Code authorizes a municipality to exercise police-power based regulations in the management of the public rights-of-way to the extent reasonably necessary to protect the health, safety and welfare of the public; and

WHEREAS, Texas Constitutional provisions and statutes collectively recognize the authority and inherent control of the City over its streets and public rights-of-way, which have historically included the authority to require the relocation of utility improvements and other facilities located therein at the expense of the owner of such facilities to accommodate the construction of public improvement projects in such areas; and

WHEREAS, the City is the authority primarily responsible for constructing and maintaining essential public works facilities, including streets and water, sewer and storm

PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY

drainage facilities, most of which are located in public rights-of-way under the jurisdiction and management of the City; and

WHEREAS, the construction and maintenance of these public works are necessary and essential to protect the health, safety and welfare of the public; and

WHEREAS, facilities other than City public works are often located within the public right-of-way and frequently interfere with the construction and maintenance of the streets and other public works projects; and

WHEREAS, the City Council finds that experience has demonstrated that the relocation of utility improvements and other facilities to accommodate public construction projects at the City's request is often not timely completed, resulting in construction delays that prolong the completion of City projects, increase City and City contractor costs on public improvement projects, and subject the City to contractual delay damages; and

WHEREAS, the City Council finds that it is appropriate for the City and owners of other facilities in the public rights of way to work together to plan for, coordinate and minimize the relocation of facilities within the public rights-of-way; and

WHEREAS, the City Council finds that it will enhance the ability of the City to coordinate with the owners of facilities located in the public rights-of-way to have current contact information for each owner on file; and

WHEREAS, neither the Texas Constitution nor Texas statutes prescribe rules or procedures to ensure that facilities located in, on or under public streets and rights-of-way

**PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY**

will be relocated in a timely and efficient manner to accommodate City public works projects, but do authorize the City to adopt such rules and procedures; and

WHEREAS, the City Council hereby finds that the public health, safety and welfare require the adoption of procedures to ensure the prompt and efficient relocation of facilities located in public streets and rights-of-way; **NOW, THEREFORE;**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the recitals and findings contained in the preamble of this Ordinance are hereby determined to be true and correct and are hereby adopted.

Section 2. That the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Section 40-31, which shall read as follows:

“Sec. 40-31. Registry of facility owners.

The owner of any facility as defined in article XVIII of this chapter, other than a pipeline that is subject to the provisions of article IX of Chapter 40 of this Code, shall provide to the director of public works and engineering, and thereafter maintain current, contact information indicating the name and address of the owner of the facility and the individual at that address designated as a contact for the owner. The information shall be in the form prescribed by the director of public works and engineering. If an owner does not have contact information on file, the owner shall provide the contact information at the time application is made for an excavation permit pursuant to article V of this chapter. It shall be unlawful for any owner to fail to provide or to maintain current information as required by this section.”

Section 3. That Chapter 40 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Article XVIII to read as follows:

“ARTICLE XVIII. RELOCATION OF PRIVATELY-OWNED FACILITIES

**PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY**

Sec. 40-381. Definitions.

As used in this article, the following terms shall have the meanings ascribed in this section, unless the context of their usage clearly indicates another meaning:

Facility means any structure, device or other thing whatsoever that is installed or maintained in, on, within, under, over or above a public right-of-way within the city.

Public right-of-way means any public street right-of-way located in the city, including the entire area between the boundary lines of every right-of-way (including but not limited to roads, streets, alleys, highways, boulevards, bridges, tunnels, or similar thoroughfares).

Public works project means any construction, reconstruction, improvement, repair or maintenance project undertaken by or on behalf of the city, including but not limited to projects included on the City's capital improvement plan regardless of source of funding.

Relocate means to move, remove or replace a facility.

Sec. 40-382. Relocation required.

(a) Whenever the city engineer determines, in the exercise of sound engineering judgment, that a facility should be relocated for the accomplishment of a public works project, the owner of the facility shall relocate the facility at the owner's sole expense in accordance with this article. In the event that an owner's failure to relocate a facility in accordance with this article causes the city to incur expenses, damages or losses, including loss of grant funds, for any resulting delay, the owner of the facility shall be responsible for the city's expenses, damages or losses.

(b) It shall be a policy of the city to design public works projects to minimize relocation of facilities, but the city shall not be obligated to design a public works project to avoid facility relocation and the determination of the city engineer of the appropriate design of the public works project shall be final.

PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY

Sec. 40-383. Notice of annual adopted capital improvement plan.

The city engineer shall provide notice of the passage of the annual adopted capital improvement plan for the city within 60 days of its passage by the city council. Notice shall be given by first class letter deposited into the United States postal service to the person and at the address on file with the city pursuant to section 40-31 of this Code and shall identify the location on the city's website where the adopted capital improvements plan can be reviewed.

Sec. 40-384. City engineer's preliminary notice.

When during the design of a public works project the city engineer, based on information then available to him, determines that the presence of a facility in a public right-of-way may interfere with a public works project so that the relocation of the facility may be necessary, the city engineer shall provide the owner of the facility written notice of the planned public works project and the potential for relocation. The city engineer shall make this determination as soon as practicable, but no later than a reasonable period following receipt of a preliminary engineering report for the public works project, and shall give the notice to the owner as soon as practicable thereafter. The notice shall be given to the contact person identified pursuant to section 40-31 or section 40-232 of this Code, as applicable, by any means that requires proof of delivery. The notice shall identify the public works project and provide the owner with an opportunity to discuss with the city engineer the public works project and potential design alternatives that could avoid facility relocation. Notice pursuant to this and the preceding section of this Code is for the purpose of coordination only and is not a condition precedent to the city's exercise of its rights and remedies under this article.

Sec. 40-385. City engineer's final determination and notice.

(a) The city engineer shall determine before completion of final design of a public works project whether the design of the public works project requires relocation of a facility and shall provide notice thereof to the owner of any facility required to be relocated. The notice shall be given as provided in section 40-384 of this Code. In making a determination pursuant to this section, the city engineer or the director of public works and

PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY

engineering, as applicable, shall consider the purpose of the public works project, the timetable for construction, the complexity of the public works project, the number of facilities potentially affected by the project, the number of facility relocations required for the project, the cost and complexity of relocating each facility and any other factors he determines in the exercise of sound engineering judgement are relevant to the public works project.

(b) Notwithstanding the notice provisions of this Code that are otherwise applicable, if the city engineer discovers during the construction of a public works project:

- (1) a facility located in the public right-of-way not previously known to the city engineer which requires relocation; or
- (2) that inaccurate information about the location of the facility was provided and relocation is required which was not previously anticipated,

the city engineer shall give notice of the necessity for relocation pursuant to subsection (a) of this section.

(c) The owner of the facility shall have a period of 60 days following the date of the notice sent pursuant to subsection (a) of this section to submit a proposed schedule for relocation of the facility for approval by the city engineer. The city and the owner may enter into a memorandum of agreement, in a form approved by the city attorney, evidencing agreement on the relocation schedule. The city engineer for good cause may extend, for a period not to exceed an additional 60 days, the time for negotiation of a relocation schedule.

(d) No schedule for the relocation of a facility shall provide a period for relocation of longer than 180 days without written approval of the director of the public works and engineering, who for good cause shown by the facility owner, may extend the period of time for relocation. The time allowed for relocation shall commence on the date agreed to by the city engineer and the facility owner and shall be suspended upon the occurrence and extended for the duration of an event of force majeure, which shall include a strike, war or act of war (whether an actual declaration of war is made or not), insurrection, riot, act of public enemy, accident, fire, flood or other act of

PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY

God, sabotage or other events, where the facility owner has exercised all due care in the prevention thereof so that the causes or other events are beyond the control and without the fault or negligence of the facility owner. For good cause shown by the facility owner, the city engineer may determine that the failure of the city to timely process a properly filed, complete application for a city permit or approval required for the facility relocation constitutes an event of force majeure.

Sec. 40-386. Relocation authorized; other legal action.

(a) If upon the expiration of 60 days from the date of the city engineer's notice to the owner pursuant to subsection 40-385(a) of this Code, or any extension of time approved by the city engineer, the city and the owner have not agreed upon a schedule for the relocation of the facility at the owner's expense, the city engineer is authorized to:

- (1) Refer the matter to the city attorney for appropriate legal action; or
- (2) Complete the relocation of the facility, or cause the relocation of the facility to be relocated, on behalf of the owner and, subject to subsection (e) of this section, recover the cost of the relocation from the owner.

(b) If the city engineer determines that the owner has not timely complied with the terms of an agreed relocation schedule and that the unfinished relocation of the facility will delay completion of the affected city project, the city engineer is authorized to:

- (1) Refer the matter to the city attorney for appropriate legal action; or
- (2) Relocate the facility, or cause the facility to be relocated, on behalf of the owner and, subject to subsection (e) of this section, recover the cost of the relocation from the owner.

(c) Failure of a facility owner to provide a relocation schedule satisfactory to the city engineer within the initial 60 day period, or any extension thereof, shall constitute authorization for the city to assess

PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY

damages, including expenses, damages or losses for project delay, and, subject to subsection (e) of this section, recover costs of relocating the facility from the owner and shall also constitute a waiver by the owner of any claim for damages against the city.

(d) Failure of a facility owner to comply with an agreed relocation schedule shall constitute authorization for the city to recover damages, including expenses, damages or losses for project delay, and recover costs of relocating the facility from the owner and shall also constitute a waiver by the owner of any claim for damages against the city.

(e) All relocations required under this article shall be at the sole expense of the owner of the facility, except to the extent provided otherwise in a current, valid city franchise held by the owner of the facility or by section 40-234(k) of this Code. In addition, if the city requires the relocation of a facility from a location approved by the city as part of a public works project pursuant to this article within five years following the date of the relocation of the facility, the city shall bear the cost of the subsequent relocation of the facility.

(f) The city engineer's certification of the costs of relocation of any facility undertaken on behalf of an owner shall constitute prima facie evidence of the reasonableness of the costs chargeable to the owner.

Sec. 40-387. Notice after relocation.

If a facility is relocated under section 40-385 of this Code, the city engineer shall, within 30 days of the completion of the relocation, notify the owner of the facility that is relocated of the owner's right to a hearing under section 40-388 of this Code.

**PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY**

Sec. 40-388. Hearing upon written request.

The owner of a facility that is relocated under section 40-386 of this Code shall, upon written request within 10 days from the mailing of the city engineer's notice under section 40-387 of this Code, be entitled to a hearing on the issue of the reasonableness of the city's costs of relocation. The hearing shall be conducted by a hearing officer designated by the director of public works and engineering, and the director shall promulgate rules for hearings. The hearing officer's decision on the issue of the reasonableness of the city's costs of relocation is final.

Sec. 40-389. Conflicts.

The provisions of the Article IX of Chapter 40 of this Code shall control for those facilities governed thereby to the extent inconsistent with this article.

Sec. 40-390. Actions authorized to enforce article.

The city attorney is authorized to institute appropriate civil proceedings to compel the relocation of any facility whose relocation the city engineer determines to be necessary for a public works project and seek other relief consistent with this article."

Section 4. That the information required by Section 40-31 of the Code of Ordinances, as adopted by this Ordinance, shall be submitted by the owner of any facility located in, on, within, under, over or above a public right-of-way on the effective date of this Ordinance that is subject to the requirements of Section 40-31 of the Code of Ordinances, as adopted by this Ordinance, not later than the 30th day after the effective date of this Ordinance. It shall be unlawful for any owner of a qualifying facility to fail to provide the information required by Section 40-31 of the Code of Ordinances, as adopted by this Ordinance, within such time period.

**PUBLIC COMMENT DRAFT 8/20/04
NOT YET APPROVED BY THE CITY ATTORNEY**

Section 5. That if any provision, section, subsection, sentence, clause, or phrase of the Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

Section 6. That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor.

PASSED AND APPROVED this ____ day of _____, 2004.

Mayor of the City of Houston

Prepared by Legal Dep't. _____
DFM:dfm September 8, 2004 Senior Assistant City Attorney
Requested by: Michael S. Marcotte, P.E.
Director, Department of Public Works & Engineering
L.D. File No. 0340200049001